SUPREME COURT, U. S. No. 718

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

ARTHUR B. SACHS AND M. PRIAL CURRAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF.

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MAY IT PLEASE THE COURT:

We submit that the government's brief highlights, rather than refutes, the importance and necessity of hearing Sachs' and Curran's petition on the merits. Significantly, the government does not dispute several of the key grounds and reasons for granting the writ:

First: The government does not dispute that the case involves a direct clash between Fifth and Sixth Amendment rights; the government instead asks the Court to accept the unsupported and wholly speculative assumption that preferring Kahn's Fifth Amendment rights over Sachs' and Curran's rights under the

Sixth Amendment probably did not result in prejudice[1] (see pp. 3-5, *infra*).

Second: The government does not dispute that the severance problem of this case is a recurring source of confusion and conflict among both federal and state courts throughout the country, as documented in our Petition (pp. 14-16). Indeed, the government is silent concerning the cases (other than *de Luna*) that demonstrate the widespread disagreement and differing criteria over severance. *E.g.*, *People* v. *Hannon*, 50 Misc. 2d 297, 270 N. Y. S. 2d 327 (1966); *People* v. *Massie*, 59 Cal. Rptr. 733, 428 P. 2d 869, 879-86, esp. p. 886 n. 31 (1967); and see the additional cases and authorities cited at pp. 14-16 of our Petition.

Third: The government does not dispute that since Kahn was dismissed from Counts 8, 9, 10 and 11 (involving the dramatic nighttime withdrawal of $991,900.00 from Leyden Savings and Loan Association), Kahn could have been questioned at a separate trial

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1. The government erroneously poses the question presented in our case as being whether the trial court "*abused its discretion*" in denying a severance (Gov. Br. p. 2; emphasis added.) The government also begins its argument by saying that petitioners Sachs and Curran "*now* argue" that denial of a severance from Kahn violated their Sixth Amendment rights (*id.* at p. 4; emphasis added). Throughout this litigation, we have presented the severance issue as a constitutional question under the Sixth Amendment (as well as a question of construction of Rule 14, F. R. Crim. P.). The government cannot evade this important constitutional issue by disguising it under the talismanic label of "discretion." By assuming that the trial judge may exercise discretion and choose between the Fifth Amendment rights of one defendant and the Sixth Amendment rights of another defendant because of alleged inconvenience, the government is asking the Court to tolerate a continuing and needless conflict between two Amendments of equal importance. (See our Petition at pp. 1-2, 10.)

by Sachs and Curran concerning this critically important transaction (our Petition pp. 5-6, 9, n. 5); nor does the government deny that Kahn was the central figure in *all* the transactions involved and that he was the *only* witness having personal and first-hand knowledge of all the facts who was not called to the witness stand.[2]

Fourth: The government does not dispute that severance was denied only upon the prosecution's unsupported and general allegation of "inconvenience," and that *no* special reasons were presented for denying separate trials (see our Petition at pp. 17-20).

We submit that these undisputed facts, standing alone, compellingly justify the granting of full review of Sachs' and Curran's petition on the merits.

We turn to the arguments that the government does make in opposing the writ:

I. THE GOVERNMENT'S POSITION THAT SEVERANCE WAS UNNECESSARY IS ENTIRELY SPECULATIVE AND WITHOUT MERIT.

The government's brief nowhere suggests any reason to support the trial court's denial of severance, other than general inconvenience. See *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580, 595 (discussed in our Petition at p. 19). The government simply argues that the unexplained denial *may have been* non-prejudicial to Sachs and Curran. This contention is based upon a series of purely speculative and unsupported assumptions.

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2. The government also does not dispute that Sachs and Curran received *none* of the proceeds of any of the loans questioned in the indictment.

The government speculates that Kahn might not have been willing to testify on petitioners' behalf at a separate trial (Gov. Br. p. 6). It is equally possible, however, that he would have been willing; it is also unquestionable that he could have been *compelled* to testify on all *non*-incriminating subjects (particularly the night-time withdrawal from Leyden—covered in Counts 8, 9, 10 and 11 on which Sachs alone stood trial—when neither Sachs nor Curran was present; see our petition, pp. 5-6, 9, n. 5). Moreover, if the trial of Sachs and Curran followed that of Kahn, Kahn in all likelihood could have been compelled to testify as to all of the transactions involved.

The government likewise speculates that if Kahn refused to testify at a separate trial, it is questionable "whether an inference could be legitimately drawn from a co-indictee's desire to stand on his privilege." (Gov. Br., p. 7.) The government cites absolutely no authority to support its negative answer to this question. We have cited substantial authority, including the unequivocal requirement of the Fifth Circuit in the *de Luna* case, to support our affirmative answer (see our Petition at p. 10, n. 6, and p. 12). Regardless of the answer that this Court finally adopts, the problem is an important and recurring question forcefully raised in this case.[3]

In addition, the government speculates that Kahn might not have given testimony favorable to Sachs and Curran because their "involvement was not a matter peculiarly within Kahn's knowledge" (Gov. Br., p. 5). This specula-

3. Still another government speculation concerning the right to comment is whether or not the defendants Sachs and Curran would have derived any benefit from contrasting to the jury their willingness to testify and Kahn's silence (Gov. Br., p. 9). The argument hardly seems worthy of refutation for any one experienced in the trial of cases is keenly aware of the benefit that would so be obtained by Sachs and Curran (our Petition, p. 10, n. 6).

tion is simply not the fact. Kahn was the principal and the prime mover in all the transactions on trial; Kahn received all the proceeds and benefits, and he and his employees (not Sachs and Curran) arranged many if not most of the necessary steps to execute the loans in question. No witness was in a better position to testify as to the exact truth concerning Sachs' and Curran's defense of innocence than Kahn. In the last analysis, the government's conjecture that Kahn would not have given testimony favorable to Sachs and Curran is at war with common sense; a defendant would hardly insist upon calling a co-defendant that he knows will give *unfavorable* testimony.

The government's *ad hominem* speculations concerning prejudice are not only unfounded but, we think, clearly demonstrate the necessity of the severance rule that we propose. Indeed, the purpose of the rule we urge is to avoid exactly the sort of speculative argument indulged in by the government as to what might or might not have occurred if the petitioners had been afforded their Sixth Amendment rights. Surely, the safeguarding of constitutional rights should not rest upon conjectures and surmises so frail and unrealistic as those offered here. And signally, the government's series of speculations to show no prejudice fly in the face of this Court's rationale in *Chapman* v. *California*, 386 U. S. 18 (1967), requiring the prosecution to prove *beyond a reasonable doubt* that a denial of constitutional rights is not prejudicial.

II. THE GOVERNMENT HAS SHOWN NO VALID DISTINCTIONS BETWEEN THIS CASE AND THE WASHINGTON AND DE LUNA CASES.

The government seeks to distinguish *Washington* v. *Texas*, 388 U. S. 14 (1967) and *de Luna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962) on essentially the same ground: those two cases each involved only two people

accused of a single isolated act. In *de Luna*, the only "factual issue" was "which of two occupants of an automobile had knowingly possessed the narcotics thrown from the car's window;" (Gov. Br. p. 7) and in *Washington*, the only factual issue was who had fired the fatal shot. The attempted distinction suggests that severance should be required only where the alleged crime consists of one isolated act and the defenses are mutually exclusive.[4]

The government's suggested rule would entirely exclude complex and multiphased transactions involved in this, and many other, federal criminal prosecutions. Indeed, as the Court has repeatedly recognized, the dangers of prejudice because of joint prosecution multiply as the complexity of the charged offenses increases. *Grunewald* v. *United States*, 353 U. S. 391, 404-05; *Krulewitch* v. *United States*, 336 U. S. 440, 445-58 (Jackson, *J.*, concurring); *Delli Paoli* v. *United States*, 352 U. S. 232, 246-48 (Frankfurter, *J.*, dissenting). It would be ironic if this Court were to condone a rule limiting severance to the simple case where two defendants are each blaming the other for a single charged act, and precluding severance in those cases that have been the principal source of concern. Moreover, as we pointed out in our Petition, the requirements of the Seventh Circuit's decision below:

> "are themselves mutually exclusive and contradictory, when judged from any realistic or practical standpoint. It would be the extremely rare—if not unheard of—case where co-defendants throw the *whole blame* on each other, and yet one obliges the other with a pretrial statement *absolving* the other from blame." (p. 16.)

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4. The Seventh Circuit's decision below adds still another requirement, *i.e.*, that proof be adduced that the co-defendant will give exculpatory testimony at a separate trial (Petition, pp. 16-17).

A rule so restricting severance plainly does not satisfy current day standards of even-handed criminal justice.

The government also tries to discount the clear conflict between this case and *de Luna* by asserting that the conflicting portions of *de Luna* are "clearly dictum" (Gov. Br. p. 8). This is simply not so and is merely another way of saying that the government disagrees with the *de Luna* case. As pointed out in our petition, the only difference between *de Luna* and this case is the procedural posture in which each case came before the Court of Appeals. In *de Luna* the non-testifying defendant's rights had been violated by allowing comment to the jury on his refusal to testify; here the rights of the testifying defendants (Sachs and Curran) were violated because they could not summon Kahn at the joint trial, examine him, and comment to the jury on any refusal to testify (see our Petition, p. 13, n. 10).

The conflict between this case and *de Luna* can best be demonstrated by asking what each Court of Appeals would have done in the other's case. It is demonstrably clear that in the instant case the Fifth Circuit would have required separate trials; the Court explicitly so declared in the *de Luna* opinion:

> "And considering the case from Gomez's point of view [Gomez, like Sachs and Curran, testified] his attorneys should be free to draw all rational inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts. *Gomez has rights as well as de Luna, and they should be no less than if he were prosecuted singly. His right to confrontation allows him to invoke every inference from de Luna's absence from the stand.*" (308 F. 2d at 143; emphasis added.)

By the same token, it is equally clear that the Seventh Circuit would have denied a severance in the *de Luna* case. Although the defenses in *de Luna* were "mutually exclusive," the second requirement of the Seventh Circuit was not met, *i.e.*, there was no showing that the non-testifying defendant would give testimony exculpating the co-defendant at a separate trial (the ground on which the Seventh Circuit distinguished *United States* v. *Echeles*, 352 F. 2d 892; our Petition, p. 16, n. 11). Moreover, the Seventh Circuit emphatically rejected, on alleged grounds of general inconvenience to the government, the Fifth Circuit's declared rule that "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, *the trial judge's duty is to order that the defendants be tried separately.*" (308 F. 2d at 141; emphasis added.) (Our Petition, pp. 12-13.)

Finally, the government's attempt to relegate the *de Luna* severance requirement to "dictum" is indefensible in light of the fact that a number of other courts (in conflict with the Seventh Circuit) are following the announced rule of *de Luna* and are requiring severance [*e.g.*, *People* v. *Hannon*, 50 Misc. 2d 297, 270 N. Y. S. 2d 327 (1966), and District Courts in the Fifth Circuit; our Petition, pp. 13-15]. In sum, it is plain that until this Court resolves the matter co-defendants in the various circuit, district and state courts will receive different severance treatment upon identical facts.

III. THE GOVERNMENT HAS ERRONEOUSLY PORTRAYED THE RECORD.

In two important instances the government's brief misreads the record. The government intimates (for the first time) that petitioners' severance claim may have been waived by the following statement of their trial counsel:

> "Your Honor, in connection with this question of the severance, in a memorandum which we filed in which we discussed the Echles [sic] case, I indicated the possibility that we might call Mr. Kahn; I said that we would take it up in advance.
>
> "I want to say that we have decided that that will not be done so that particular question will not arise." Gov. Br. pp. 5-6; C. A. 7 (App. 328.)[5]

Prior to this statement of counsel, and during the trial, the District Judge had denied a renewed motion for severance by Sachs and Curran—made by petitioners *after* Kahn had reaffirmed that he would not take the stand (Tr. 2121-22). As a corollary to the renewed request for severance, petitioners argued that at minimum they should be able to comment to the jury concerning Kahn's failure to testify.

When the District Court denied the petitioners' renewed motion for severance, it was then obvious to petitioners' counsel that because of the Fifth Amendment he could not possibly call Kahn in front of the jury, and hence the quoted statement at that time, "I want to say that we have decided that that will not be done so that particular question will not arise." Thereafter, counsel only pressed his corollary request, *i.e.*, the right to comment on Kahn's silence. The remaining portions of the colloquy—not quoted by the government—make it plain that counsel was respectfully acknowledging the reality of the court's denial

5. The government made no mention whatsoever of this statement in either the District Court or the Court of Appeals.

of severance and was attempting to press the right to comment concerning Kahn.[6] This request was also denied.

The government also misreads the record in claiming that damaging testimony was adduced from independent witnesses against Sachs and Curran; the government's brief represents that there was "a state examiner who told

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6. "There is still something that remains, your Honor, a question which we can discuss at any time the Court cares to of my using a reference to testimony by my defendants, but I just want to say this.

"The Court: Well, the reference will be what?

"Mr. Kirby: Well, the reference would simply be that my defendants testified, my defendants gave their full story, my defendants exposed themselves to the full rigors of an extensive cross-examination, and that Mr. Kahn did not.

"The Court: Well, at that point, this is where I am not going to permit you to make any such reference to Mr. Kahn and I am going to be very explicit on it, and at the time that you begin your final argument it will be made very clear to you that any such reference will not be made and should not be made and you may make any such offer that you want to in advance of the argument, but you—you may refer to the fact that your clients have testified and told their version of the story, but any reference whatever to the fact that Mr. Kahn did not take the stand will be improper, and would be improper, and should not be made. I want that very clear.

"I, of course, expect you, as an officer of the Court, to abide by the Court's ruling.

"Mr. Kirby: Well, your Honor has had the memoranda.

"The Court: I have had it and considered it.

"Mr. Kirby: You have considered it.

"The Court: I have considered it fully.

"Mr. Kirby: This is your ruling.

"The Court: Yes.

"Mr. Kirby: I assure you I will abide by it.

"The Court: I am sure you will.

"Mr. Kirby: It does not need to again be brought up.

"The Court: No.

"Mr. Kirby: Before the start of the arguments. *Our objection to the restriction can be noted at this time.*" (C. A. 7 App. 328-29; emphasis added.)

of incriminating statements by Sachs (Tr. 449-458)." (Gov. Br. p. 5.) (The purpose of this statement by the government is not apparent since sufficiency of the evidence is not at issue here.) An examination of the cited pages of the trial transcript reveals that the government's representation is simply not true. The "state examiner," Mr. Waggoner, did *not* testify that Sachs had made any incriminating statements.[7]

IV. THE WRIT SHOULD BE GRANTED SO THAT THIS CASE MAY BE CONSIDERED TOGETHER WITH BRUTON v. UNITED STATES, NO. 705.

After the printing of our Petition for certiorari the Court granted certiorari in two related cases: *Bruton* v. *United States,* No. 705 and *Garner* v. *Yeager,* No. 704. Both of these cases raised the issue of whether at the joint trial of two defendants, the trial court may receive in evidence the confession of one defendant that incriminates the co-defendant. The Court is thus being asked to reconsider its 5-4 decision in *Delli Paoli* v. *United States,* 352 U. S. 232 (1957). On November 6, 1967, the Court summarily reversed and remanded the *Garner* case for

7. Quite the contrary, Mr. Waggoner testified:

"Q. What if anything else was said by any of the parties about that?

"A. Well, Mr. Sachs said he knew nothing about this loan to Ferrari and knew nothing about the $155,000 loan.

"Although I tried to convince him that we had found that the proceeds had gone into a cashier's check to him, he denied having any knowledge of it in that meeting.

"So, I left that point as it was in that conversation." (Tr. 454.)

Mr. Waggoner also testified that Sachs told him he was not interested financially in the loan to Sandy Building Corp., a fact that the government has never disputed (Tr. 453). Nowhere did Mr. Waggoner testify as to any "incriminating statements by Sachs."

reconsideration in light of a recent decision of the New Jersey Supreme Court on another issue in the case unrelated to *Delli Paoli*—thus leaving *Bruton,* No. 705, as the sole case in which the *Delli Paoli* severance problem will be argued and decided.

The severance question presented in our case is closely related to, and is in fact the converse of, the question to be considered in *Bruton.* Petitioners Sachs and Curran sought a separate trial from their co-defendant Kahn in order to *introduce,* rather than exclude, relevant evidence, *i.e.,* the testimony of Kahn who had unique first-hand knowledge of all the facts. By being denied a severance, Sachs and Curran lost their rights of compulsory process under the Sixth Amendment (see our Petition, pp. 8-12).

We respectfully submit that it would be most useful for the Court to consider these related aspects of the severance problem together, since they raise several problems in common that are of grave and recurring importance. For example: How likely should it appear that a defendant will be prejudiced by a joint trial before a severance is required? What basic standards or guidelines should trial courts follow in exercising their discretion with regard to motions for severance? How much, if any, weight should be afforded a prosecution claim of general inconvenience as a reason for denying severance? [The inter-connection of the *Delli Paoli* severance problem with petitioners' dilemma is delineated in the recent California Supreme Court decision requiring severance in *People* v. *Massie,* 59 Cal. Rep. 733, 428 P. 2d 869 at 886 (1967).]

There are, to be sure, some differences between the factual context of our case and that of *Bruton;* but we believe these differences reflect an even greater necessity for the Court to review our case together with *Bruton:*

(1) In our case, there is a conflict between the

Seventh and Fifth Circuits (as well as many state and lower federal courts) (our Petition, pages 12-16); in *Bruton*, the only Circuit that is out of line is the District of Columbia Circuit that is acting "in the exercise of its special power to make rules for that Circuit . . ." (Memorandum for the Government in *Bruton* v. *U. S.* at page 7, note 5).

(2) In our case, the courts have created a head-on, but unnecessary, conflict between two important Constitutional rights (the Fifth and Sixth Amendments); in the *Bruton* case only one such right is involved.

(3) In our case, this Court has never considered the issue raised; in *Bruton*, the Court did specifically consider the issue once before in *Delli Paoli* in 1957.

(4) In the *Bruton* type of case, the trial judge is in a position to evaluate the prejudice allegedly resulting from introduction of the challenged evidence, since he knows precisely what the evidence is (i.e., a confession); in our type of case, the trial judge can only guess as to what prejudice will result from the exclusion of allegedly exculpatory evidence, since he has no way of knowing what the evidence may consist of.

All of the above reasons highlight the need for a definitive resolution of the question in our petition together with the question to be decided in *Bruton*. We shall, of course, conform to any briefing schedule that the Court sets so that *Bruton* and this case can be heard on the merits together.

CONCLUSION.

For the foregoing reasons, in addition to those presented in our Petition, we submit that Sachs' and Curran's Petition for certiorari should be granted.

Respectfully submitted,

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